MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

JIM MATHEWS
JOE FREELAND

P.O. BOX 1568
AUSTIN, TEXAS 78767-1568

(512) 404-7800
FAX: (512) 703-2785

September 25, 2009

Filed Electronically

Ms. LaDonna Castañuela, Chief Clerk
ATTN: Agenda Docket Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Docket No. 2006-1831-WR – City of College Station Draft Water Right No. WRPERM 5913.

Dear Ms. Castañuela:

Attached for filing is the response of the City of College Station (the "City") to requests for hearing in the referenced docket regarding the City's application for a bed and banks authorization for groundwater based return flows. As authorized by your September 11, 2009 letter we are filing this response electronically without hard copy. Copies of the City's response are being sent via telecopy to the persons identified in your September 11, 2009 letter. Please do not hesitate to contact me if you have any questions regarding this filing.

Sincerely,

Jim Mathews

cc: Service List

TCEQ DOCKET NO. 2006-1831-WR

CITY OF COLLEGE STATION	§	BEFORE THE
APPLICATION FOR A BED	§	TEXAS COMMISSION ON
AND BANKS AUTHORIZATION	§	ENVIRONMENTAL QUALITY

CITY OF COLLEGE STATION'S RESPONSE TO HEARING REQUESTS

COMES NOW the City of College Station (the "City") and files its response to hearing requests regarding the referenced application for a bed and banks authorization to convey its groundwater based return flows through watercourses.

Nature of Authorization Requested By College Station

As a preliminary matter, it is important to note exactly what type of authority the City has requested from the TCEQ. The City merely seeks authority to convey its groundwater-based discharges through various watercourses to its proposed diversion point in Brazoria County. The groundwater will be discharged into a tributary of the Brazos River once it has been treated at one of the City's wastewater treatment plants. The City is not seeking authority to convey, divert or use any state water. Because the City seeks authorization to convey and divert groundwater that it owns, only water right holders who divert surface water *downstream* from the City's proposed *diversion point*, or other property owners *downstream* from the proposed *diversion point*, could potentially be adversely affected by the City's diversions. None of the parties requesting a contested case hearing could be adversely affected because none of them have alleged that they are authorized to divert surface water downstream from the City's proposed diversion point, or that they have any other property interest that could be adversely affected.

The issues to be decided by the TCEQ in order to take action on the City's application include: (1) the amount of groundwater the City will discharge into the Brazos River; (2) the location where the City will divert its groundwater in Brazoria County; (3) the amount of water the City may divert at the diversion point (taking into account carriage losses); and (4) whether special conditions are needed to provide for instream uses and freshwater inflows to bays and estuaries. Tex. Water Code §11.042 (b).

Brazos River Authority

The Brazos River Authority ("BRA") asserts that it has a number of water rights that "may be impaired if the [City's] application is granted." The water rights listed by BRA in its

hearing request include a number of reservoirs. However, the City's groundwater will not be conveyed through, or stored in, any of those reservoirs.[1] Furthermore, BRA has not asserted that it is authorized to divert water *downstream* from the point where the City proposes to *divert* its groundwater. The only way BRA conceivably could be adversely affected by the City's proposed project would be if the City's water flowed through BRA's reservoirs, or if BRA diverted water downstream from the City's diversion point. Since neither of those events will occur, BRA is not adversely affected and its request for a contested case hearing should be denied.

The groundwater-based return flows the City proposes to convey through watercourses will at no time be owned by the State of Texas nor will they be available to BRA. Instead, the City will retain ownership of the water while it is conveyed to the proposed diversion point. See Exhibit 1 (TCEQ order recognizing that the City's application does not involve state water, and directing the Executive Director to refrain from processing the City's application under rules applicable to state water). Moreover, the TCEQ staff recognizes the City will retain ownership of its groundwater-based flows and that users of state-owned water will not have access to the City's water as evidenced by the draft authorization (i.e., Section 4 of the draft authorization recognizes that the City's flows will not have a priority date and will not be subject to priority calls from senior water rights).

Because the City will retain ownership of its groundwater-based return flows and because those return flows are not subject to priority calls from senior water right holders, BRA would not have a right to use or rely on the City's privately owned groundwater-based return flows. Since BRA could not use or rely on the City's water, BRA could not be adversely affected by the City's proposal to divert its groundwater for reuse. Accordingly, BRA's request for hearing should be denied.

BRA's assertion that it has a number of water rights that "may be impaired if the [City's] application is granted" is without support. BRA fails to provide any factual basis for its conclusory assertions. Merely asserting that BRA has water rights is insufficient to demonstrate it has a justiciable interest as is required under the TCEQ's rules. See 30 Tex. Admin. Code §55.251 (c)(2). BRA's hearing request fails to explain how and why it believes it could be

[1] The only potential reservoir identified by BRA downstream of the City's *discharge* point is the *proposed* Allens Creek Reservoir, a proposed impoundment to be located on a tributary upstream of the Brazos River.

affected by the City's proposal to convey its groundwater-based return flows through the bed and banks of various watercourses. For that reason alone BRA's request should be denied.

Wellborn SUD

Wellborn SUD ("Wellborn") asserts that it could be adversely affected if the TCEQ were to grant the City's application because: (i) if granted, the City's application will adversely affect Wellborn's ability to divert surface water at a point downstream from the City's discharge points; (ii) conditions need to be placed in the authorization to distinguish between the water Wellborn may divert, and the water the City may convey; and (iii) some of the City's groundwater-based return flows allegedly are comprised of Wellborn's privately owned groundwater.

With respect to the first concern raised by Wellborn, merely asserting that Wellborn's ability to divert water will be adversely affected without explaining the basis for that allegation is insufficient to demonstrate it has a justiciable interest as is required under the TCEQ's rules. See 30 Tex. Admin. Code §55.251 (c)(2). Furthermore, the City is proposing only that it be allowed to use the bed and banks of various watercourses to convey its groundwater to its proposed diversion point, which will be many miles downstream of Wellborn's proposed diversion point. There is no conceivable way that merely authorizing the City to convey its groundwater past Wellborn's proposed diversion point could ever adversely affect Wellborn's ability to divert state-owned water. Furthermore, Wellborn could not put a call on the City's groundwater so there is no way that the City diverting it for reuse downstream of Wellborn's diversion point would ever adversely affect Wellborn.

The second concern raised by Wellborn is that a proper accounting system needs to be included in the authorization to protect the rights of other water users such as Wellborn. There is absolutely nothing that needs to be included in the City's authorization to protect water users *such as Wellborn.* As noted, the City seeks authorization only to convey its groundwater past Wellborn's proposed diversion point to the City's proposed diversion point downstream. The only way Wellborn could be adversely affected by such an authorization would be if it diverted water *downstream* from the City's proposed diversion point and the City diverted more water than it would be authorized to withdraw. Mindful of its obligation to avoid diverting state water from the Brazos River, the City submitted as part of its application an accounting system sufficient to ensure it diverts only the amount of groundwater-based return flows it places into

the stream, minus carriage losses. TCEQ staff has approved the City's accounting system. What is important is not that the City has to comply with a TCEQ approved accounting system. What is important is that Wellborn's stated concerns do not demonstrate that it could ever be adversely affected by the City's proposed bed and banks conveyance and subsequent diversion downstream of Welloborn.

With respect to its third concern, Wellborn has relinquished any rights it might have had to potable water it provides to its retail water customers that, after use by those customers, is sent to the City's wastewater treatment plants.[2] Alternatively, ownership of Wellborn's water passed to its retail customers when it was delivered to their residences and/or businesses. To summarize, Wellborn has abandoned, forfeited or conveyed any ownership rights it might have had with respect to water it provides to its customers who in turn send the water to the City's wastewater treatment plants. Furthermore, even if Wellborn retained ownership of its water that eventually is discharged from the City's wastewater treatment plants, that issue is irrelevant in determining whether to grant the City's application.

Coastal Conservation Association

In order for the Coastal Conservation Association ("CCA") to demonstrate it has standing, it must show that: (i) its members would otherwise have standing to sue in their own right; (ii) the interests it seeks to protect are germane to the organization's purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Texas Assoc. of Business v. Texas Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993). The TCEQ's rules adopt a virtually identical associational standing test. 30 Tex. Admin. Code §55.252 (a).

With respect to the first prong of the associational standing test adopted by the Texas Supreme Court and contained in the TCEQ's rules, an allegation of a general type of recreational or environmental impact, by itself, does not constitute an injury in fact sufficient to confer standing. *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 2009 WL 1896070, *5 (Tex. App. – Austin 2009) (opinion not yet released for publication). Instead, a protestant's alleged injury to an environmental, scientific or recreational interest is *insufficient* to confer standing "in the absence of allegations that the [protestant] has an interest in the property

[2] The City provides wastewater service to customers in a portion of Wellborn's water CCN service area. The wastewater received from those customers of the City's wastewater system is approximately ½ of one percent of the City's total wastewater flow.

affected by the [applicant's] actions." Id. As long recognized in Texas law, economic, recreational, or environmental interest may give rise to standing, but only if the protestant is able to demonstrate it will suffer some *injury in fact individually*, and not as a member of the general public. Id. at page 5; see also *Lake Medina Conservation Society v. Texas Natural Resource Conservation Commission*, 980 S.W.2d 511, 515 (Tex. App. – Austin 1998, pet. denied) By way of example, in *Texas River Protection Assoc., v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 147, 151 (Tex. App. – Austin 1995, writ denied) the court found that a person had standing to challenge a proposed diversion of water from a stream based on alleged aesthetic and recreational interests in the river *because* the protestant owned riverfront property that could have been affected by the applicant. See also *Medina Lake*, 980 S.W.2d at 515-516 (members of association opposing water diversion permit had standing *because* they owned lakefront property that could have been affected by the applicant). CCA has alleged no ownership interest in any property that could be affected by the City's bed and banks authorization and, therefore, it has failed to satisfy the first prong of the associational standing test because none of its members has standing to request a hearing in their own right.

Even if CCA were not required to demonstrate it has an ownership interest in the property affected by the City's proposed actions, CCA still has not demonstrated it has standing. As noted, the first prong of the associational standing test adopted by the Texas Supreme Court and by the TCEQ requires an association to demonstrate at least one of its members would otherwise have standing to sue in their own right. CCA's request for hearing does not meet that standard. Instead, CCA merely asserts that some of its unnamed members fish in and around the mouth of the Brazos River and have an interest in maintaining natural marine breeding habitats at that location. The mere fact that CCA members desire to go fishing in state owned water does not give them standing to oppose an application for a bed and banks authorization in their own right. Nor does the fact that CCA members desire to preserve or conserve marine breeding habitat confer standing to oppose a bed and banks authorization in their own right.[3] Under both of those circumstances CCA members have no protected interests peculiar to them individually that could be adversely affected by the City's proposed project. Instead, the CCA members are doing nothing more than seeking to protect interests that are common to the general public (the

[3] CCA has not identified any of its members who would otherwise have standing to request a hearing in their own right as contemplated by 30 Tex. Admin. Code §55.252 (a)(1).

public's right to use state water for fishing or recreational purposes).[4] The interests asserted by CCA, therefore, are insufficient to demonstrate that any of its individual members could sustain an injury sufficiently particularized so as to distinguish the alleged harm from that experienced by the general public. *Medina Lake*, 980 S.W.2d at 515. Because it has not demonstrated that any of its members would have standing to request a hearing in their own right, CCA's request for hearing should be denied.

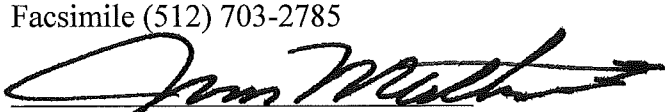
The only way CCA members would have standing to oppose the City's application in their own right would be if they had water rights or other property interests that could be affected by the City's proposed bed and banks conveyance. Because CCA has failed to demonstrate any of its members have such interest that could be adversely affected by the City's proposed project, none of its members may bring suit in their own right and CCA's request for hearing should, therefore, be denied.

Requested Relief

The City requests that the TCEQ deny all outstanding requests for contested case hearing and issue an order approving the City's bed and banks application.

Respectfully submitted,

Mathews & Freeland, L.L.P.
327 Congress Ave., Ste. 300
Austin, Texas 78701
Telephone (512) 404-7800
Facsimile (512) 703-2785

By: 

Jim Mathews
TBN: 13188700
email: jmathews@mandf.com

ATTORNEYS FOR CITY OF COLLEGE STATION

[4] The mere fact that the TCEQ may impose special conditions if needed to maintain instream flows and flows into bays and estuaries in no way confers standing on a CCA member to challenge the City's application. The authority to impose such a special condition was added by the Legislature so that the TCEQ could protect the State's interests regarding its freshwater and marine wildlife, not to confer standing on members of the general public.

CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of September, 2009 a true and correct copy of the foregoing document was served by telecopy with follow-up by U.S. mail on the following:

Todd Galiga, Senior Attorney
Environmental Law Division
TCEQ, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0600
(512) 239-0606 fax

Steve Ramos, Technical Staff
Water Supply Division
TCEQ, MC-160
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6538
(512) 239-2214 fax

Blas Coy, Jr., Attorney
Public Interest Counsel
TCEQ, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6363
(512) 239-6377 fax

Bridget Bohac, Director
Office of Public Assistance
TCEQ, -MC-108
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-4000
(512) 239-4007 fax

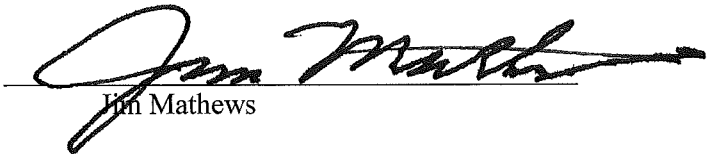
Kyle Lucas
Alternative Dispute Resolution
TCEQ, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-4010
(512) 239-4015 fax

Doug Caroom
Bickerstaff, Heath, Delgado, Acosta, LLP
816 Congress Avenue Suite 1700
Austin, Texas 78701-2442
(512) 404-7829
(512) 320-5638 fax

Leonard Dougal
Jackson Walker, LLP
100 Congress Avenue, Suite 1100
Austin, Texas 78701-4072
(512) 236-2000
(512) 236-2002 fax

Robin Melvin
Graves, Dougherty, Hearon & Moody
P.O. Box 98
Austin, Texas 78767
(512) 480-5688
(512) 480-5888
Melvin@gdhm.com

Carolyn Ahrens
Booth, Ahrens, & Werkenthin, PC
515 Congress Avenue, Suite 1515
Austin, Texas 78701-3504



Jim Mathews

EXHIBIT 1

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS
COUNTY OF TRAVIS
I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission.
Given under my hand and the seal of office on
DEC 20 2006
LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

AN INTERIM ORDER concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding the Executive Director's decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission; TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR..

On December 13, 2006, the Texas Commission on Environmental Quality (the "Commission") considered during its open meeting the Motion to Overturn (the "Motion") filed by the City of Bryan and the City of College Station (Cities) requesting the Commission overturn the Executive Director's September 21, 2006, decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission. In his letters dated September 21, 2006, the Executive Director stated that he was returning the applications because the Cities had not submitted certain specific information with regard to quantified targets for water savings, including goals for water loss programs and municipal use, and evidence indicating official adoption of water conservation plans that included these specified minimum requirements. The Commission also considered all related filings, the oral argument of the Cities, the Executive Director, and the Office of Public Interest Counsel, and answers to the Commission's questions during the public meeting

After such consideration and subsequent deliberation in open meeting, the Commission determined that it has the jurisdiction and authority to act on the Cities' request to reverse the Executive Director's decisions that the Cities' applications were not administratively complete under the general powers in Chapter 5 of the Water Code, and in particular, under Section 5.221 of the Water Code. The Commission also determined as a matter of law with regard to bed and banks authorization applications that request authorization to divert and reuse return flows derived exclusively from privately owned groundwater that, based on Water Code Section 11.042(b), such applications do not involve state water.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The Commission has jurisdiction under the general powers in Chapter 5 of the Water Code, particularly, Section 5.221 of Chapter 5, to consider and act on the Cities' Motion to Overturn;
2. The Commission determines as a matter of law that the Cities' applications do not involve state water based on Section 11.042(b) of the Water Code, which provides the criteria for the owner of privately owned groundwater to retain ownership of groundwater after discharge into a state watercourse;
3.. The Executive Director is directed to process the Cities' applications solely under Section 11.042(b) and the Commission's bed and banks authorization rules and not under statutes and rules applicable to state water;
4. The Cities' applications are remanded to the Executive Director for administrative and technical review; and

5. This Order is confined to bed and banks authorization applications that involve exclusively groundwater-based return flows.

Issue Date: DEC 20 2006

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman